Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

OMNI INNOVATIONS, LLC, a Washington Limited Liability company, Plaintiff, v. INSURANCE ONLY, INC.; MICHAEL WEDEKING, and his marital community; PATRICK WEDEKING, and his marital community, Defendants.	NO. CV06-1210TSZ **DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT FOR INJUNCTIVE RELIEF** [Note for Hearing: July 13, 2007]

COME NOW defendants, Insurance Only, Inc., Patrick Wedeking and Michael Wedeking, and submit their Memorandum in Opposition to Plaintiff Omni Innovations, LLC's, Motion for Partial Summary Judgment for Injunctive Relief.

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This memorandum is supported by the Declaration of Michael Wedeking, the Declaration of Larry G. Johnson, the Declaration of Brett Shavers and the Declaration of Cheryl R. G. Adamson, filed herewith.

FACTUAL SUMMARY

On or about September 13, 2006, plaintiff Omni Innovations, LLC (Omni), filed suit against defendants Insurance Only, Inc., Michael Wedeking and Patrick Wedeking (collectively referred to as "Insurance Only") for alleged violations of the CAN-SPAM Act, 15 U.S.C. § 7701, et seq., the Washington Commercial Electronic Mail Act, RCW 19.190.010, et seq., and the Washington Consumer Protection Act, RCW 19.86, et seq. Specifically, the Complaint alleges that from August 2003[1] through May 2006, Insurance Only initiated the transmission of e-mails, or conspired with others to transmit e-mails, that violated the above-referenced statutes because they misrepresented or obscured information in identifying the point or origin or the transmission path, or contained header information that was materially false or misleading. The parties exchanged initial disclosures, and since then, the matter has essentially been "on hold." Very little discovery has taken place. Now, Omni has filed a motion for partial summary judgment, seeking a permanent injunction against Insurance Only.

Somewhat amazingly, Omni claims that the material facts are not in dispute. Nothing could be further from the truth. Indeed, all material facts are in dispute, and of course, Omni bears the burden of proof on each and every fact necessary to support

[1]According to the Complaint, Omni did not allegedly become an "Internet access provider," the alleged basis for federal court jurisdiction, until May of 2005.

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its claim.

Omni erroneously states that, "It is indisputable that Plaintiffs Omni Innovations LLC and James S. Gordon Jr. (hereafter collectively "Gordon") have received numerous commercial electronic mail messages (hereinafter "spam") transmitted by, or on behalf of Defendants." *See* Plaintiffs' Motion for Partial Summary Judgment for Injunctive Relief, p. 2. Initially, it should be noted that James S. Gordon, Jr., is *not* a plaintiff in this lawsuit; rather, only Omni is a plaintiff. This mistake occurs because Omni and/or Gordon have filed numerous "spam" cases in Washington state and federal courts, and several nearly identical motions for partial summary judgment against various defendants in those cases. Some of those motions are in cases with claims by both Omni and Gordon. *See, e.g., Omni v. Inviva, Inc.*, United States District Court for the Western District of Washington, Seattle, Cause No. CV-06-1537-JCC, a copy of which is attached as Exhibit 2 to the Declaration of Cheryl R. G. Adamson.

In any event, Insurance Only disputes that it sent commercial electronic mail messages to Omni (more specifically, e-mail addresses serviced by Omni), let alone illegal e-mail messages (Omni's briefing would lead one to believe that all commercial e-mail messages are illegal, which is not true). Insurance Only further disputes that it procured the sending of any such e-mail messages to Omni. Further, Insurance Only disputes that it sent or caused to be sent any e-mails that were in violation of federal or state law. More specific to the instant motion, Insurance Only denies that it has sent commercial e-mail advertisement messages to any individual or entity, let alone to Omni-related mailboxes, for approximately one year. *See*

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Declaration of Michael Wedeking.

Omni's motion also states that Gordon repeatedly requested Insurance Only stop sending spam to him by a variety of means, including use of "opt-out" mechanisms, and that despite this, Insurance Only "continued to send Gordon spam." Again, Gordon is not a plaintiff in this action; Omni is the sole plaintiff. Further, Insurance Only denies receiving such communications from Gordon. Omni does not allege that it used opt-out mechanisms or otherwise advised Insurance Only to cease sending commercial e-mails. Moreover, Insurance Only only disputes that it sent illegal e-mails to Omni or that Omni corresponded in any manner with Insurance Only. *See* Declaration of Michael Wedeking.

The Declaration of James S. Gordon, Jr., filed in support of Omni's motion is similarly problematic. Gordon complains about volumes of spam from countless spammers, but very little about Insurance Only. Although Gordon asserts that Insurance Only has continued to send "unlawful spam" to him, that is a factual issue that is disputed by Insurance Only. Moreover, the sample e-mails attached as Exhibit "B" to the Gordon declaration, and upon which Omni relies as evidence of "continuing" e-mails by Insurance Only, were not sent by or at the direction of Insurance Only. Indeed, those e-mails advertise health insurance products, and Insurance Only does not advertise health insurance. Insurance Only has marketed life insurance products. *See* Declaration of Michael Wedeking. None of the e-mails in Exhibit B can be traced to Insurance Only. *See* Declaration of Larry G. Johnson. Insurance Only does not own, nor does it have any economic affiliation with gapgol.com or QuoteInAMinute.com. *See* Declaration of Michael Wedeking. Omni

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has not presented, nor can it present, any e-mails that were sent by Insurance Only, let alone illegal e-mails. All of the other e-mails attached to Omni's motion are from the years 2003 and 2004; yet, Omni does not allege it became an Internet access provider until May of 2005. Thus, any e-mails that predate May of 2005 are irrelevant to the CAN-SPAM Act claim.

In its initial disclosures, Omni produced a disk allegedly containing illegal e-mails either sent by, or "procured" by, Insurance Only. The disk contained many thousands of e-mails, the vast majority of which were clearly not associated with Insurance Only or the life insurance industry. In fact, the disk contained many obviously unrelated e-mails, including advertisements for erectile dysfunction drugs, electronics, travel services, and the like. *See* Declaration of Michael Wedeking. Omni has refused requests that it cull the e-mails and provide only those that it truly believes were sent by Insurance Only. Instead, Omni's pattern is to send volumes of e-mails and leave it to the defendants to sort through each and every one of them. *See* Declaration of Cheryl R. G. Adamson.

Insurance Only has reviewed a large sampling of the e-mails contained on the CD, it taking too long to review all of them, that Omni claims were illegal and sent by Insurance Only. This review revealed that none of the e-mails were sent by Insurance Only. Additionally, Insurance Only has retained two expert witnesses to assist in defending the claim. Both of these computer forensic experts opine that the e-mails produced by Omni cannot be traced back to Insurance Only, and Omni has not even provided reliable evidence to the Court. *See* Declaration of Larry G. Johnson; Declaration of Brett Shavers.

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ARGUMENT

A. Summary Judgment Standard.

A moving party is entitled to summary judgment only when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). If the opposing party is unable, due to reasons such as additional discovery needing to be conducted, to present by affidavit facts essential to justify the party's opposition to the summary judgment motion, the court may refuse the application for judgment or may order a continuance of the motion to permit affidavits to be obtained or depositions to be taken or discovery to be had or any such order as it deems just. Fed. R. Civ. P. 56(f). A material fact is one upon which the outcome of the litigation depends, at least in part. *Morris v. McNicol*, 83 Wash. 2d 491, 494, 519 P.2d 7 (1974).

In evaluating a motion for summary judgment, a court must resolve all reasonable inferences against the moving party, and in favor of the non-moving party. *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000) ("[r]easonable doubts as to the existence of [a] material factual issue are resolved against the moving parties and inferences are drawn in the light most favorable to the non-moving party"). All facts are to be viewed in the light most favorable to the non-moving party. *Atlantic*

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Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 332 n.2, 110 S.Ct. 1884 (1990) ("Because the case comes to us on review of summary judgment, 'inferences to be drawn from the fact . . . must be viewed in the light most favorable to the party opposing the motion.'"). As will be shown below, Omni is not entitled to an order of partial summary judgment.

B. Omni Is Not Entitled to Injunctive Relief.

Omni's *sole* basis for its motion for a permanent injunction is the provision in the CAN-SPAM Act against sending an "Internet access provider" commercial e-mails more than ten (10) days after the Internet access provider has properly requested no such additional e-mails be sent. Specifically, Omni claims that it is entitled to a permanent injunction pursuant to the following provision:

> A provider of Internet access service adversely affected by a violation of section 7704(a)(1) of this title, 7704(b) of this title, or 7704(d) of this title, or a pattern or practice that violates paragraph (2), (3), (4), or (5) of section 7704(a) of this title, may bring a civil action in any district court of the United States with jurisdiction over the defendant --
>
> (A) to enjoin further violation by the defendant; or
>
> (B) to recover damages in an amount equal to the greater of --
>
> (i) actual monetary loss incurred by the provider of Internet access service as a result of such violation; or

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(ii) the amount determined under paragraph (3).

15 U.S.C. § 7706(g)(1) (underline added). Not all commercial e-mails are illegal. Indeed, the law sets forth the requirements of acceptable e-mail messages, as well as the prohibitions:

> **(a) Requirements for transmission of messages.** (1) Prohibition of false or misleading transmission information. It is unlawful for any person to initiate the transmission to a protected computer of a commercial electronic mail message, or a transactional or relationship message, that contains, or is accompanied by, header information that is materially false or materially misleading. For purposes of this paragraph–
>
> (A) header information that is technically accurate but includes an originating electronic e-mail address, domain name, or Internet Protocol address the access to which for purposes of initiating the message was obtained by means of false or fraudulent pretenses or representations shall be considered materially misleading;
>
> (B) a "from" line (the line identifying or purporting to identify a person initiating the message) that accurately identifies any person who initiated the message shall not be considered materially false or materially misleading; and
>
> (C) header information shall be considered materially misleading if it fails to identify accurately a protected computer used to initiate the message because the person initiating the message knowingly uses another protected computer to relay or retransmit the message for purposes of disguising its origin.

* * *

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> (3) Including of return address or comparable mechanism in commercial electronic mail. (A) In general. It is unlawful for any person to initiate the transmission to a protected computer of a commercial electronic mail message that does not contain a functioning return electronic mail address or other Internet-based mechanism, clearly and conspicuously displayed that –
>
> > (i) a recipient may use to submit, in a manner specified in the message, a reply electronic mail message or other form of Internet-based communication requesting not to receive future commercial electronic mail messages from that sender at the electronic mail address where the message was received; and
> >
> > (ii) remains capable of receiving such messages or communications for no less than 30 days after the transmission of the original message.
>
> (4) Prohibition of transmission of commercial electronic mail after objection. (A) In general. If a recipient makes a request using a mechanism provided pursuant to paragraph (3) not to receive some or any commercial electronic mail messages from such sender, then it is unlawful –
>
> > (i) for the sender to initiate the transmission to the recipient, more than 10 business days after the receipt of such request, or a commercial electronic mail message that falls within the scope of the request; . . . .

15 U.S.C. § 7704.

The CAN-SPAM Act is designed to be enforced by government entities. A limited private right of action is given to Internet access providers only. 15 U.S.C.

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§ 7706. Here, Omni relies specifically on a violation of § 7704(a)(4), based on an alleged pattern or practice by Insurance Only to continue sending electronic mail messages to Omni despite repeated requests that such messages not be sent.

Initially, it should be noted that a legitimate question exists as to whether Omni has standing to bring claims under the CAN-SPAM Act. Specifically, a federal district court for the Western District of Washington recently ruled that Omni does *not* have standing to bring a claim under the CAN-SPAM Act, and dismissed a remarkably similar case to the case at bar. The court's ruling was based on the conclusions that Omni may not meet the definition of an Internet access provider, and Omni has not suffered the requisite harm, or "adverse effect," to pursue a private action under the CAN-SPAM Act. *See*, Order in *Gordon v. Virtumundo, Inc., et al.*, United States District Court Western District of Washington at Seattle, Case No. 06-0204-JCC, a copy of which is attached as Exhibit 1 to the Declaration of Cheryl Adamson, p.13. Insurance Only believes that Judge Coughenour's decision in *Gordon v. Virtumundo* operates as collateral estoppel on the same issue in this case, and Insurance Only intends to move to dismiss the claims by Omni on the same bases as those decided by Judge Coughenour.

Additionally, even if Omni has standing to sue under the CAN-SPAM Act,

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Omni has not proved, nor can Omni prove, that Insurance Only has violated the Act. Omni's unsupported assertions to that effect do not *prove* the facts asserted.

Noticeably absent from Omni's motion is any discussion regarding the legal standards for issuance of a permanent injunction. This is likely because Omni knows that it cannot meet the stringent standards for a permanent injunction. Instead, Omni wants to leap over the requirement that it prove its case by simply stating that the facts are as Omni wishes the facts to be. Moreover, Omni employs the misleading argument that if Insurance Only does not intend to send commercial e-mails to Omni, it will simply agree to permanent injunction. Omni's inability and unwillingness to prove its case should not be condoned. Moreover, Insurance Only should not have to incur the time and expense of being motioned into court by Omni every time it *asserts* an e-mail was received in violation of an injunction, all before Omni has proved a single element of its case.

To obtain a permanent injunction, a party must prove four factors: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent

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injunction." *See, e.g., eBay Inc. v. MercExchange, L.L.C.*, 126 S.Ct. 1837, 1839 (2006). Further, whether to grant or deny permanent injunctive relief is within the equitable discretion of the district court. Id. To qualify for permanent injunctive relief, a plaintiff must establish actual success on the merits, that they will sustain irreparable injury and that remedies at law are inadequate, and that the balance of equities favors injunctive relief. Thus, a plaintiff must actually prove its own case as well as the circumstances that entitle it to injunctive relief as opposed to other legal remedies. *Walters v. Reno*, 145 F.3d 1032, 1048, (9th Cir. 1998).

Omni points to *America Online, Inc. v. Smith*, 2006 WL 181674 (E.D.Va. 2006), an unpublished decision, as support for its entitlement to permanent injunctive relief. What Omni fails to tell the Court, however, is that the plaintiff in *America Online* had established "success on the merits" via court order following the defendant's refusal to participate in the case. Specifically, the *America Online* court noted that, "Defendants refused to participate in this case, willfully disregarding their discovery obligations and failing to comply with multiple court orders. As a result of Defendants' failure to participate in discovery and their refusal to obey court orders, on September 2, 2005, this Court granted Plaintiff's Motion for Terminating Sanctions, ordering that Defendants shall not oppose any claim or introduce evidence

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and striking the affirmative defenses." Id. Thus, there could be no genuine issue of material fact regarding liability because the court had directed liability against the defendant based on defendant's misconduct. The court did not impose a permanent injunction before the plaintiff proved its case, which is exactly what Omni is asking this Court to do now.

In addition to Omni not proving success on the merits, it has not established irreparable harm and the inadequacy of monetary damages. Indeed, Omni's Complaint seeks statutory damages, not actual damages. Moreover, the *Gordon v. Virtumundo* court, evaluating Omni's claim and evidence over the same period of time, found that Omni had not established adverse effect, let alone irreparable harm. In fact, Gordon testified in the *Virtumundo* case that he keeps e-mail accounts active to retain the benefits of receiving spam for "research" and obtaining financial settlements from alleged spammers. Indeed, *all* of Omni's and Gordon's income or revenue for the years 2006 and 2007 has been from spam settlements. *See* Declaration of Cheryl R.G. Adamson, Exhibit 1, pp. 7-8.

Further, there are numerous issues of fact underlying Omni's motion, and precluding the granting of such motion, including but not limited to the following: (1) whether Insurance Only sent any electronic mail messages to Omni; (2) whether

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Insurance Only procured the sending of electronic mail messages to Omni; (3) whether such e-mails, if any, violated the law; (4) whether Omni properly asked Insurance Only not to send it electronic mail messages, yet Insurance Only engaged in a pattern or practice of ignoring such request(s); (5) whether Omni can establish sufficient damages or harm, and the like.

The type of evidence, both documentary and testimonial, that would be required to determine whether Insurance Only sent, or procured, any illegal e-mails to Omni-related addresses, is not before this Court. Because e-mail headers, subject lines and text can be forged or altered, and because "zombie" computers can be used, capturing the server logs from both sender and receiver, and tracing each e-mail along its route or transmission path, is required to prove the e-mail's origin, and that it was not altered. *See* Declaration of Brett Shavers; Declaration of Larry G. Johnson. *Indeed, the e-mail messages produced by Omni in this case are not originals, have been altered and are missing content.* Omni has not provided evidence proving that any illegal e-mails were sent, or procured, by Insurance Only. *See* Declaration of Larry G. Johnson; Declaration of Michael Wedeking.

CONCLUSION

For the reasons set forth above, this Court should deny Omni's motion for

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partial summary judgment for injunctive relief.

DATED this 9th day of July, 2007.

RETTIG OSBORNE FORGETTE, LLP

By [signature]
CHERYL R.G. ADAMSON,
WSBA #19799
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: Robert J. Siegel, and I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants: N/A.

s/ Cheryl R.G. Adamson / WSBA #19799
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